United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-6040

To be argued by
PAUL H. SILVERMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6040

UNITED STATES OF AMERICA and WALTER ROSS, Revenue Agent, Internal Revenue Service,

Petitioners-Appellants, Cross-Appellees,

—v.—

GEOFFREY DAVEY, As Secretary of THE CONTINENTAL CORPORATION,

Respondent-Appellee, Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PETITIONERS-APPELLANTS-CROSS-APPELLEES

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America and Walter Ross, Revenue Agent.

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Assistant United States Attorneys, Of Counsel.

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Statutes Involved

Section 6001 of Internal Revenue Code of 1954, 26 U.S.C. § 6001. Notice or Regulations Requiring Records, Statements and Special Returns.

> Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

Treas. Regulation § 1.6001-1, 26 C.F.R. § 1.6001-1:

> (a) In general. Except as provided in paragraph (b) of this section, any person subject to tax under subtitle A of the Code, or any person required to file a return of information with respect to income, shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.
>
> (b) Farmers and wage-earners. * * *
>
> * * * * *
>
> (e) Retention of records. The books or records required by this section shall be kept at all times available for inspection by authorized internal revenue officers or employees, and shall be retained

so long as the contents thereof may become material in the administration of any internal revenue law.

Revenue Ruling 71-20, 1971-1 Cum. Bull. 392:

> Advice has been requested whether punched cards, magnetic tapes, disks, and other machine-sensible data media used in the automatic data processing of accounting transactions constitute records within the meaning of section 6001 of the Internal Revenue Code of 1954 and section 1.6001-1 of the Income Tax Regulations.
>
> * * * * *
>
> It is held that punched cards, magnetic tapes, disks, and other machine-sensible data media used for recording, consolidating, and summarizing accounting transactions and records within a taxpayer's automatic data processing system are records within the mean of section 6001 of the Code and section 1.6001-1 of the regulations and are required to be retained so long as the contents may become material in the administration of any internal revenue law.
>
> * * * * *

Section 7402 of Internal Revenue Code of 1954, 26 U.S.C. § 7402. Jurisdiction of District Courts.

> (a) To issue Orders, Processes, and Judgments.
>
> * * * * *
>
> (b) To Enforce Summons. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States . . . shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Section 7602 of Internal Revenue Code of 1954, 26 U.S.C. § 7602. Examination of Books and Witnesses.

> For the purpose of . . . determining the liability of any person for any internal revenue tax . . . the Secretary or his delegate is authorized—(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry; (2) To summon . . . any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data . . . as may be relevant or material to such inquiry . . .

Section 7604 of Internal Revenue Code of 1954, 26 U.S.C. § 7604. Enforcement of Summons.

> (a) Jurisdiction of District Court. If any person is summoned under the internal revenue laws to . . . produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such . . . production of books, papers, records, or other data.

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Docket No. 76-6040

UNITED STATES OF AMERICA and WALTER ROSS,
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—v.—

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CONTINENTAL CORPORATION,
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BRIEF OF PETITIONERS-APPELLANTS-CROSS-APPELLEES

Issues Presented for Review

1. Whether in ordering enforcement of an Internal Revenue Service summons the District Court erred in holding that the Internal Revenue Service is restricted to examine copies of, rather than original, taxpayer records.

2. Whether in ordering enforcement of an Internal Revenue Service summons the District Court erred in holding that the Internal Revenue Service must reimburse the taxpayer for the costs incurred in complying with the Internal Revenue Service summons.

Statement of the Case

(a) The Proceedings Below

The United States of America, and Walter Ross, Revenue Agent, Internal Revenue Service, petitioners-appellants, cross-appellees ("the Government"), appeal from the protective order embodied as a condition to the judgment of the United States District Court for the Southern District of New York, Honorable Henry F. Werker, entered December 18, 1975. The judgment orders enforcement of an Internal Revenue Service summons served upon Geoffrey Davey, as Secretary of The Continental Corporation ("Continental Corp."), respondent-appellee, cross-appellant. (A-163).* The District Court judgment is pursuant to its memorandum decision, entered December 4, 1975, following a hearing held on October 16, 1975. *United States* v. *Davey*, 404 F. Supp. 1283 (S.D.N.Y. 1975). (A-157-62). The Government timely filed its notice of appeal on February 13, 1976 and Continental Corp. filed a cross-appeal on February 20, 1976. Jurisdiction is conferred on this Court by 28 U.S.C. § 1291.

(b) Statement of Facts

Taxpayer Continental Corp. is a billion dollar multi-company corporation which has integrated a computer system into its financial operation and record-keeping scheme. (A-72, 86). Under Rev. Rul. 71-20, 1971-1 Cum. Bull. 392, taxpayers are required to retain computer tape and other computer software which comprise an integral part of the taxpayer's financial record-keeping system for so long as the contents may become material in the administration of any internal revenue law. *See,*

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* (A-)—refers to pages of Joint Appendix on Appeal.

Section 6001.* To comply with Rev. Rul. 71-20, Continental Corp. selected and currently retains approximately 37 reels of magnetic computer recording tape. But for compliance with Rev. Rul. 71-20, many of the 37 reels would have been erased by Continental Corp. within 30 days of their creation. (A-75-76, 81-87, 94-95). According to Continental Corp., these 37 reels of tape contain general expense information and loss payment and expense information for 1972 and loss payment and expense information for 1971. (A-94-95). Continental Corp. asserts that the general expense information tape for 1971 was erased in the normal practice. (A-95).

As with any magnetic recording tape, the data on Continental Corp.'s 37 reels of tape is susceptible to alteration or erasure if a powerful magnet is placed in direct physical contact or if the tape is subjected to excessive heat. (A-90). With reasonable care and handling, however, the computer tape can be safely used. (A-90-92). A plastic protective ring can be employed each time a tape-run is made. Such a device prevents other data from being written on the tape and prevents erasure of data already on the tape. (A-107-08).

In 1973, the yearly Internal Revenue Service ("I.R.S.") large case tax audit was commenced by Revenue Agent Walter Ross to determine the civil tax liability of taxpayer Continental Corp. and its subsidiaries, which had filed a consolidated tax return for calendar year 1971. (A-68-69, 116-17). For efficiency and expediency the audit was subsequently expanded to include the taxpayer's consolidated tax return for calendar year 1972. Due to the size and complexity of taxpayer Continental Corp., the I.R.S. conducts a virtually

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* Section references are to the Internal Revenue Code of 1954, as amended (26 U.S.C.), unless otherwise specified.

constant audit of Continental Corp. on the taxpayer's own premises and with the assistance of Continental Corp. personnel. (A-68-69).

In connection with the Continental Corp. audit, Revenue Agent Ross made informal and then formal information document requests in an effort to examine the 37 reels of tape containing Continental Corp. financial data. (A-73). The taxpayer refused to produce the tape reels, offering instead pre-set print-out sheets made from the tape. (A-70, 73). These pre-set print-out sheets do not necessarily contain all of the data embodied on the tape, and certainly do not embody the data in a form functional for I.R.S. audit purposes. (A-97-99, 118, 121-27, 131-36, 143-44).

On January 7, 1975, in order to obtain the withheld 37 reels of tape, Agent Ross issued and served a summons on Geoffrey Davey ("Davey"), as Secretary of taxpayer Continental Corp. The summons required Davey to appear on January 28, 1975 and to bring with him:

> All Machine-Sensible Data Media used for recording, consolidating or summarizing accounting or financial transactions and records in respect of general expenses and losses expended or incurred during the years 1971 and 1972, including but not limited to Magnetic Tape number 110101 and Magnetic Tape Number 421001, for each year respectively. (A-41).

On January 28, 1975, Davey did not appear with the required machine-sensible data, but rather forwarded a letter of explanation. The letter stated that the summons imposed an unnecessary burden because Davey had already offered to provide the I.R.S. with preset print-out records made from the computer tape. The letter concluded that Davey had provided the I.R.S. with all the books and records which he was required to produce for purposes of the audit. (A-25-29).

On September 16, 1975 this I.R.S. summons enforcement proceeding was commenced. On October 16, 1975 a hearing was held and by memorandum decision entered December 4, 1975, and judgment entered on December 18, 1975, the District Court ordered enforcement of the I.R.S. summons subject to two conditions: (a) that examination be limited to duplicate computer tape, and (b) that cost of the computer tape duplication be borne by the Government.

It is the conditions imposed upon the enforcement order from which the Government now appeals. The decision, in pertinent part, states:

> However, I am of the opinion that Continental Corporation is entitled to a protective order to the extent of safeguarding the original tapes and the cost of reproducing those tapes. I therefore direct that Continental Corporation prepare under the supervision of the Computer Specialist who may be assigned to this case a duplicate copy of any and all tapes encompassed within the summons served upon the respondent herein and that the duplicate tapes be delivered to the Internal Revenue Service upon payment of the expense of producing those tapes.
>
> Without reflection upon the expertise of the Computer Specialists or the Internal Revenue Service I am of the opinion that the taxpayer should be afforded the right to retain the original since the possibility of editing, erasure or destruction or loss always exists.

United States v. *Davey*, 404 F. Supp. 1283, 1285 (S.D. N.Y. 1975).

ARGUMENT

The District Court below erred in conditioning enforcement of the involved I.R.S. summons and accordingly the involved summons should be enforced without conditions.

POINT I

The District Court erred in restricting the involved summons enforcement to duplicates of the records sought.

A. The District Court was without authority to impose the "duplicate" restriction.

The authority of the District Court to hear and rule on matters concerning the I.R.S. is specifically defined by statute. *See, e.g.*, 28 U.S.C. §§ 1340, 1346(a)(1), 1346(e); Sections 7402, 7604. The District Court's jurisdiction over the proceeding below was conferred by Sections 7402(b) and 7604(a). In identical language, both sections state that the District Court's authority in respect of summons enforcement is restricted to compelling compliance with the summons.

In this proceeding the Government applied to the District Court to have an I.R.S. summons enforced as to the taxpayer's financial records in a civil tax audit. The only issues properly before the Court in the enforcement proceeding below were whether the material sought by the summons might be relevant or throw light on the correctness of the taxpayer's returns and whether the manner in which the examination was to take place was unreasonably onerous. *United States* v. *Harrington*, 388 F.2d 520, 523 (2d Cir. 1968); *See, United States* v.

Powell, 379 U.S. 48 (1964). On the issue of relevance, it has been observed that

> so long as the material sought is relevant, broadness alone is not sufficient justification to refuse enforcement of the summons. *Adams* v. *F.T.C.*, 296 F.2d 861, 864 (8th Cir. 1961); *United States* v. *Giordano, supra.*

United States v. *Troupe*, 317 F. Supp. 416, 420 (W.D. Mo., 1970), *aff'd*, 438 F.2d 117 (8th Cir. 1971). The Second Circuit has stated that the guiding measure of enforcement is whether the summons is reasonable and not out of proportion to the ends sought. *United States* v. *Davey*, 426 F.2d 842, 845 (2d Cir. 1970).

At no time in the proceeding below did Continental Corp. contend that the substantive information contained on the summoned tape was irrelevant. What the taxpayer did claim was that with voluminous pre-set printout pages already at the Government's disposal, the summoned tape became redundant, and hence overly broad. The District Court clearly rejected this argument. *United States* v. *Davey, supra*, 404 F. Supp. at 1284. The taxpayer also argued that the summons should not be enforced because of concern for the safety of the tapes. It was this concern alone which resulted in the Court's order restricting the I.R.S. to inspection of duplicate rather than original tape. *Id.*, 404 F. Supp. at 1285.

We submit that the District Court's interest in safeguarding the *original* taxpayer records had no proper part in the Court's determination of the only issues before it: whether the summoned tape might be relevant to the audit and whether the Government's demand for the *original* tape was unreasonably onerous. We believe that these issues clearly had to be and were resolved in the Government's favor by the District Court below and that,

as a result, the Court was required to enforce the I.R.S. summons in accordance with its terms. The taxpayer cannot be allowed to restrict the examination of its financial records through its selection of the media by which the taxpayer retains these records. If the taxpayer is concerned for the safety of the original tape to be produced, then, for its own convenience, the taxpayer may duplicate the tape and retain the duplicate tape for safekeeping.

Had the instant dispute over the production of documents arisen under the Federal Rules of Civil Procedure, the District Court's concern for the safety of the original computer tape arguably would have supported an order limiting the Government's inspection to duplicate tape. *See, Adams* v. *Dan River Mills, Inc.*, 54 F.R.D. 220 (W.D. Va. 1972). However, the District Court clearly lacked the authority to so restrict the Government in a summons enforcement proceeding under Sections 7402(b) and 7604(a). Accordingly, we respectfully submit that the District Court committed error in limiting enforcement of the I.R.S. summons to production of duplicate rather than original tape.

B. The District Court was without sufficient evidence to impose the "duplicate" restriction.

Assuming, *arguendo*, that with a proper showing of harm, the District Court had authority to restrict a summons enforcement to duplicate records, the District Court unnecessarily interfered with the administrative audit process by invoking that authority in this instance. In any summons enforcement proceeding the taxpayer bears the burden of showing that it would be an abuse of the court's process to enforce the summons as issued. *United States* v. *Powell*, *supra* at 58. In addition,

> The I.R.S. is initially aided by the presumption that it is complying with its public duty, "and it

> cannot be assumed that (IRS agents) will abuse their authority in carrying out the examination. . . . And there is a general policy against judicial intervention in the investigative stage of tax matters because of the danger of undue delay in the collection of the revenues. [Citations omitted.]

United States v. *Zack*, 375 F. Supp. 825, 829 (D. Nev. 1974). In the context of the facts developed at the hearing and the papers submitted in this proceeding, there is no evidence sufficient to justify the conclusion that it would be an abuse of the court's process to trust I.R.S. officials with the original summoned tape and that the District Court should interfere with the audit proceeding by limiting the I.R.S. to something other than what was summoned.

The evidence submitted below demonstrates that but for Continental Corp.'s compliance with Rev. Rul. 71-20, many of the 37 reels of involved summoned tape would have been retained for only 30 days after creation. (A. 87, 95).* In fact, Continental Corp. asserts that an additional 13 tapes which were summoned had already been erased in the regular course of business. (A-74, 95). Even after the decision by Continental Corp. to retain the involved tape reels, Continental thought little enough of their value to ship the original reels of tape for storage through regular mail delivery routes without maintaining duplicate sets of the tape. (A-91, 110).

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* The relevant statutes provide that a taxpayer is required to maintain its books and records relevant to its tax liability, that the I.R.S. has the right to examine the taxpayer's books and records in an audit examination, and that machine-sensible data media, *e.g.*, computer tape, constitute such books and records. Section 6001; Treas. Reg. 1.6001-1; Rev. Rul. 71-20.

At the hearing below, Mr. Moore, who is in charge of supervising the taxpayer's computer system, testified for Continental Corp. He was the only witness who testified even generally about the possibility of harm that might come to a reel of computer tape. (A-90-92, 106-108). Mr. Moore related to the Court an outline of the harm to which all computer tape is susceptible. (A-90-92). Mr. Moore explained that "excessive heat could damage them . . . .", and that "if they were in an area where they would be subject to any magnetic interference they would be damaged". (A-90).

Although Mr. Moore was Continental Corp.'s only witness to discuss any possible harm to its tape, he readily admitted that he did not have any particular knowledge of the durability of magnetic recording tape itself. Mr. Moore stated: "I can't testify as an expert on the chemical composition of the tape". (A-107).

To add insight to Mr. Moore's lack of knowledge in respect of the durability of the involved summoned tapes, Mr. Moore went on to relate that although he recognized the Journal of Accountancy as a recognized authoritatitve work in his field of accountancy, he could not agree or disagree with quoted passages taken from the Journal dealing with the very subject of the durability of tape. (A-106-107).

As to the aspect of human error in handling the involved tapes, at no time did Mr. Moore state that the tapes could be harmed if handled with reasonable care. (A-90). Nor did he even imply that there was any reason to question that the I.R.S. would exercise reasonable care in the examination of the summoned tapes. Nor did Mr. Moore state any fact to support a belief that the I.R.S. will use any less care than Continental Corp. uses in its own daily

business use. Supported only by the theory that "There's always a chance of accidental damage or erasure of tapes from someone not familiar with the IBM equipment or any equipment", Continental Corp. has banned all non-Continental Corp. personnel, including I.R.S. agents, from using their computer equipment. (A-91-92). In this regard, Mr. Moore recognized the application of a simple device called a protective ring which may be used during the computer process to prevent other data from being written on the tape and prevent erasure of data already on the computer tape. (A-107-08).

In response to this general testimony of possible harm, the Government offered evidence of the training and experience of the I.R.S. agents who would be using the summoned tape. There is a special pool of agents, schooled in the use of the computer and computer tape handling, from which an agent is assigned to each large case audit involving a computer system. (A-123). Revenue Agent Rosenberg, the computer audit specialist assigned to the audit of Continental Corp., testified that since 1972 he has been employed as an I.R.S. computer audit specialist and that in more than fifty computer-assisted audit applications, he has *never* experienced difficulty in being able to examine a taxpayer's relevant computer tapes. (A-128-29).

Based upon the evidence submitted, the District Court could not, and apparently did not, conclude that there was a serious threat of harm to the summoned tape which would cause substantial injury to the taxpayer. All the District Court found was that "the *possibility* of editing, erasure or destruction or loss *always* exists" (emphasis added), a "possibility" which exists every time an original document, be it paper or computer tape, is entrusted to another.

By restricting enforcement of the I.R.S. summons to inspection of duplicate tape simply because of the "possibility" of harm to the original tape, the District Court has miscast the burden of proof and its own proper function in a summons enforcement proceeding. Accordingly, the I.R.S. summons should have been enforced by the District Court without restriction.

POINT II

The District Court erred in requiring the I.R.S. to reimburse the taxpayer for any costs incurred in complying with an I.R.S. summons.

A. The District Court was without authority to impose costs against the I.R.S. in the summons enforcement proceeding.

Costs may not be imposed against the Government in the absence of a statute specifically providing for such imposition. *See, United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 20-21 (1926); *Cf. Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *Contra, United States* v. *Friedman*, 76-1 USTC ¶9328 (3rd Cir. 1976). In *Alyeska Pipeline*, the Wilderness Society sought to recover attorneys fees against the United States. The Supreme Court denied the request in the absence of statutory authority, noting, in pertinent part:

> The 1948 Code provided in 28 U.S.C. 2412(a) (1946 ed., Supp. II) that "[t]he United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress." The Reviser observed that § 2412(a) "is new. It follows the well-known common-law rule that a sovereign is not liable for costs unless specific provision for such liability is made by law."

Alyeska Pipeline Serv. Co. v. *Wilderness Society, supra,* at 267-68, n. 42. But *cf.* 28 U.S.C. § 2412, as amended in 1966, and 28 U.S.C. § 1920. Similarly, in *Walling* v. *Norfolk Southern Ry. Co.*, 162 F.2d 95 (4th Cir. 1947), the Fourth Circuit observed:

> * * * since public moneys cannot be paid out except under an appropriation by Congress, the courts will not enter against the government a judgment for costs which would require the payment of moneys from the public treasury, unless they are expressly authorized by Congress to do so * * *

Walling v. *Norfolk Southern Ry. Co., supra* at 96.

The proposition that, absent statutory authority, the Government is not required to pay the taxpayer for costs incurred in responding to a valid I.R.S. summons is further grounded in the fundamental principle that "the public . . . has a right to every man's evidence." VIII *Wigmore on Evidence* § 2192, p. 70 (McNaughton rev. 1961); *See United States* v. *Bryan*, 339 U.S. 323, 331 (1950). Thus, the United States Supreme Court has stated:

> It is beyond dispute that there is in fact a public obligation to provide evidence . . . and that this obligation persists no matter how financially burdensome it may be. [Citations and footnote omitted.]

Hurtado v. *United States*, 410 U.S. 578 at 589 (1973).

The applicable section, Section 7602, does not limit the summons power by requiring the I.R.S. to reimburse the costs which a witness incurs in complying with a summons. Indeed, while provisions similar to Section 7602 date back at least to the year 1864, Congress has never modified the summons power with a cost condi-

tion provision. See Sections 3614 and 3615(a)-(c) of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.); Act of February 24, 1919, c. 18, 40 Stat. 1057, Sec. 1305 and Act of June 30, 1864, c. 173, 13 Stat. 223, Sec. 14.

Nor is there any other statutory provision which requires that the I.R.S. pay record duplication costs to a taxpayer summoned to produce his records. The Third Circuit recently so held in a summons enforcement proceeding involving a third-party bank. *United States* v. *Friedman*, 76-1 USTC ¶ 9328 (3rd Cir. 1976):

> We conclude that there is no express provision of any statute or rule which authorizes the district court in a proceeding to enforce a § 7602 summons to order the government to reimburse the banks for the expenses of compliance.

United States v. *Friedman, supra.*

Despite the absence of statutory authority for the payment of costs to a taxpayer or a third party complying with an I.R.S. summons, some courts have suggested that, in rare instances, the Government may have to bear such costs in respect of third parties. *See, e.g. United States* v. *Friedman*, 76-1 USTC ¶ 9328 (3d Cir. 1976); *United States* v. *Farmers & Merchants Bank*, 75-2 USTC ¶ 9791 (C.D. Calif. 1975), *appeal pending*, CA No. 75-3690 (9th Cir.); *Cf. United States* v. *Davey*, 426 F.2d 842 (2d Cir. 1970) (allowing costs to third-party credit reporting service company).

In *United States* v. *Friedman*, the Third Circuit concluded that

> * * * the Court can modify the § 7602 summons if it is unreasonable or oppressive in scope, and it can condition a denial of enforcement in a § 7604(b)

> proceeding on the reimbursement by the government of the reasonable cost of producing the books, papers or records requested.

The Court's conclusion in *Friedman* is based only on the fact "that enforcement of a Section 7602 summons is by Section 7604(b) entrusted to the judiciary" *Id.* The Government believes this Court-made rule to be in error. But, assuming that the Court may, in rare instances, condition summons enforcement upon the Government's payment of costs, we submit that this rule is limited only to disinterested third parties and not to the taxpayer under audit, as in the instant case.

B. The District Court was without sufficient evidence to impose costs against the I.R.S. in the summons enforcement proceeding.

Even were the Court to apply the *Friedman* holding in this case, the I.R.S. may be required to bear costs only to the extent that they may be deemed unreasonable or oppressive. *United States* v. *Friedman, supra; United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129 (3d Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *United States* v. *Continental Bank & Trust Co.*, 503 F.2d 45, 47-48 (10th Cir. 1974). In *Friedman*, the Third Circuit stated

> [W]e hold that before such a [cost] condition is imposed the district court must make an individualized determination that the cost involved in complying with the summons in question exceed that which the respondent may reasonably be expected to bear as a cost of doing business.

United States v. *Friedman, supra.*

In this instance the costs could have amounted to nothing if the taxpayer had turned over the requested originals, and only about $1,300 if the tapes in question

are duplicated.* The present summons concerns itself with the books and records of the very taxpayer in audit, and the taxpayer is a billion dollar insurance company. Therefore, at the very least, the respondent herein may reasonably be expected to bear the involved costs as a cost of its doing business.

California Bankers Assn. v. *Shultz*, 416 U.S. 21 (1974) is a relevant case as to the reasonable cost test. In *California Bankers Assn.*, the banks challenged the 1970 Bank Secrecy Act which imposed general recordkeeping requirements for possible Government investigation purposes. The Supreme Court found that the cost burden imposed by the recordkeeping requirements was far form unreasonable. *California Bankers Assn.* v. *Shultz*, *supra* at 50. The Supreme Court noted that the Bank of America with $29 billion in deposits and a net income in excess of $178 million, expended $392,000 in 1971 (.00175 per cent of deposits) to comply with the microfilm recording requirements of the Act. *Id.* at 50-51, n. 22. The Government submits that the amount of the duplication cost involved with the present insurance companies' records examination—approximately $1,300—is far less a financial burden than that found reasonable in *California Bankers Assn.*

There is absolutely no support in the record below for finding that unreasonable or oppressive costs would be incurred by the taxpayer as a result of enforcement of the involved I.R.S. summons. It is solely the actual production of duplicate tape records—at a cost of approximately $1,300—which generates the costs at issue. The convenience of the taxpayer is being accorded the status of a Court order and is imposing an unwarranted expense on the Government. Any financial burden

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* Subsequent to the Government's appeal from the District Court's judgment, the I.R.S. received from Continental Corp. an invoice in the amount of $1,305.00 for duplication of the tapes in issue.

imposed upon the taxpayer in this proceeding could have been materially diminished had the taxpayer allowed the I.R.S. to provide, as it has offered, the manpower and equipment necessary for the taxpayer to comply with the involved summons.

The I.R.S. has always been willing to work with the taxpayer to reach an amicable accord. The I.R.S. cannot, however, be required to bear the burden of taxpayer's unsupported anxieties; and the District Court was without authority in this case to compel the I.R.S. to do so.

CONCLUSION

For the foregoing reasons, the involved I.R.S. summons should be ordered enforced as issued, and the judgment of the District Court should be reversed insofar as it contains a protective order requiring the Internal Revenue Service to examine duplicates of the summoned records and to reimburse the taxpayer for the costs incurred in producing said duplicates.

Dated: New York, New York
April 15, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America and Walter Ross, Revenue Agent.

PAUL H. SILVERMAN,
WILLIAM G. BALLAINE,
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Of Counsel.

★ U. S. Government Printing Office 1976— 614—350—151

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

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State of New York)
County of New York) ss

CA 76-6040

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 15th day of April, 1976 she served a copy of the within Govt's Brief and Joint Appendix

by placing the same in a properly postpaid franked envelope addressed:

Grubbs, Leahy & Donovan, Esquires
27 Cedar Street
New York, New York 10038

Walter J. Rockler
1229 - 19th St., N.W.
Washington, D. C. 20036

And deponent further says she sealed the said envelopes and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this
15th day of April, 1976

Joseph J. Lee

Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977